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No.

In the

Supreme Court of the United States

October Term, 1983

PAUL P. SWAIDA, JR.,

Petitioner,

v.

IBM RETIREMENT PLAN, RETIREMENT PLAN COMMITTEE OF THE IBM RETIREMENT PLAN, PLAN ADMINISTRATOR OF THE IBM RETIREMENT PLAN, BOARD OF DIRECTORS OF INTERNATIONAL BUSINESS MACHINES (IBM) CORPORATION, IBM VICE-PRESIDENT RESPONSIBLE FOR FINANCE, and IBM VICE-PRESIDENT RESPONSIBLE FOR PERSONNEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(For further appearances, please see reverse side of cover.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

PAUL P. SWAIDA, JR.,

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-v.-

IBM RETIREMENT PLAN, RETIREMENT PLAN COMMITTEE OF THE IBM RETIREMENT PLAN, PLAN ADMINISTRATOR OF THE IBM RETIREMENT PLAN, BOARD OF DIRECTORS OF INTERNATIONAL BUSINESS MACHINES (IBM) CORPORATION, IBM VICE-PRESIDENT RESPONSIBLE FOR FINANCE, AND IBM VICE-PRESIDENT RESPONSIBLE FOR PERSONNEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Whether certain regulations of the United States Department of the Treasury which authorize an alternative method of computing vesting for participants of private pension plans violate the Employee Retirement Income Security Act of 1974.

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Paul P. Swaida, Jr. ("Swaida" or "petitioner") petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated February 22, 1984 (1a-4a) is reported at 728 F.2d 159. The opinion of the United States District Court for the Southern District of New York dated August 24, 1983 (10a-45a) is reported at 570 F.Supp. 482.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was filed on February 22, 1984 and entered on April 24, 1984 (5a-7a). Swaida's motion for rehearing or rehear-

ing in banc was denied by the United States Court of Appeals for the Second Circuit on April 11, 1984. (8a-9a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 203(b)(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Sec. 1053(b)(2)(A) and 26 C.F.R. Sec. 1.410(a)-7(a),(d), the statutes and regulations involved herein, are set forth verbatim at 46a-49a.

STATEMENT OF THE CASE

Petitioner Swaida, plaintiff in the District Court below, is a former employee of International Business Machines Corporation ("IBM"), having been continuously so employed from June 20, 1966 to

and including April 9, 1976, a period of nine years nine months and 21 days. As an employee of IBM, Swaida was a participant in the respondent IBM Retirement Plan (the "IBM Plan"). It is undisputed that Swaida worked in excess of 1000 hours during his final nine months and 21 days of employment. (16a)

In order to be vested* under the Plan, an individual is required to complete ten years of service. ERISA Sec. 203(a)(2)(A), 29 U.S.C. Sec. 1053(a)(2)(A). (15a) It is Swaida's position that pursuant to Sec. 203(b)(2)(A) of ERISA, 29 U.S.C. Sec. 1053(b)(2)(A), which defines a year of service as a "12-consecutive month period...during which the

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*Vesting is an unconditional nonforfeitable right to receive a pension either immediately or at some point in the future.

participant has completed 1,000 hours of service," his final nine months and 21 days of employment constituted his tenth year of service* because he "completed 1,000 hours of service" within that period.**

The Plan, however, requires ten years of "continuous" service in order for a participant to be vested. The Plan has, therefore, taken the position that Swaida has only nine years nine months and 21 days of service and, accordingly, is not vested. The Plan relies on regulations promulgated by the United States

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*It is conceded that Swaida's first nine years with IBM constitute nine years of service for vesting purposes.

**The Plan was required to conform to ERISA as of January 1, 1976 and was amended retroactively to that date. (14a) It is undisputed that ERISA applies to Swaida's final nine months and 21 days of employment. (37a, n. 20)

Department of Labor* and, pursuant to Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (1978), later made final by the United States Department of the Treasury,** the so called elapsed time regulations.*** These regulations permit plans to ignore the number of hours worked by a participant and, instead, base vesting on "the total period of time which elapses while the employee is employed...." 26 C.F.R. Sec. 1.410(a)-7(a)(1)(ii). (47a)

Because the elapsed time regulations denied Swaida credit for his tenth year of service despite his having complied with the requirements of ERISA's "1000

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*41 Fed. Reg. 56,461 (1976).

**45 Fed. Reg 40,979 (1980).

***26 C.F.R. Sec. 1,410(a)-7(a), (d). (46a-49a)

hour rule," an action was commenced in the United States District Court for the Southern District of New York. The jurisdiction of the District Court was invoked pursuant to ERISA Sec. 502(a)(1)(B), (3), 29 U.S.C. Sec. 1132(a)(1)(B), (3).

No facts having been in dispute, the parties cross-moved for summary judgment. In a decision dated August 24, 1983 (10a-45a), the District Court granted respondent's motion and denied petitioner's motion finding that the elapsed time regulations were appropriate. In a decision dated February 22, 1984 (1a-4a), the United States Court of Appeals for the Second Circuit affirmed on the opinion of the District Court.

REASONS FOR GRANTING THE PETITION

The issue before this Court is one of great significance. The ultimate resolution of this issue will affect not only employees of IBM who are in the same position as Swaida, but "hundreds of thousands of participants in many existing pension plans" which rely on the elapsed time regulations. (23a)

Moreover, this is a case of first impression in any Circuit or District Court. When this factor is combined with the widespread reliance on the elapsed time regulations, the need for immediate clarification by this Court is evident. Pension plan participants need to know their rights at the present, rather than years from now, in order to plan properly for their retirements. Similarly, pension plans need to know their obligations in order to determine contribution rates,

benefits levels, and funding schedules. If the elapsed time regulations are improper, plans would benefit by that knowledge sooner, rather than later, so that appropriate steps may be taken to amend their provisions and practices.

Congress enacted ERISA with the primary purpose of increasing entitlement to benefits that employees accrue under pension plans. Congress declared the policy of the Act to be "improving the equitable character and soundness of [pension] plans by requiring them to vest the accrued benefits of employees with significant periods of service...." ERISA Sec. 2(c), 29 U.S.C. Sec. 1001(c). The legislative history of ERISA is replete with comments such as:

> It is unfair and almost invariably, tragic as well, for workers to defer income from wages or salary in anticipation

> of retirement benefits they will never get.

Comments of Representative Carl Perkins set forth at II Legislative History of the Employee Retirement Income Security Act of 1974 (G.P.O.) at 3367.

In light of such serious concerns, Congress determined that it was necessary to impose "minimum standards...assuring the equitable character of such plans and their financial soundness." ERISA Sec. 2(a), 29 U.S.C. Sec. 1001(a). Included in these minimum standards are three alternative vesting schedules, ERISA Sec. 203(a)(2)(A), (B) and (C), 29 U.S.C. Sec. 1053(a)(2)(A), (B) and (C), one of which, 10 year "cliff" vesting,* is used by the IBM Plan. These minimum standards repre-

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*So called because no partial vesting is ever achieved; rather, a participant becomes 100% vested after attaining ten years of service.

sent the lowest standards that Congress determined plans must meet in order to be considered equitable. They are, conversely, the maximum standards which plans may require employees to meet in order to attain vesting.

In furtherance of its aim of establishing minimum standards, Congress defined a "year of service" as "a calendar year, plan year, or other 12-consecutive month period*...during which the participant has completed 1,000 hours of service." ERISA Sec. 203(b)(2)(A), 29 U.S.C. Sec. 1053(b)(2)(A). It is apparent that this definition comports with Congress' intent of establishing minimum standards for vesting.

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*The IBM Plan uses a 12-consecutive month period commencing with the employee's anniversary date. For Swaida this period was June 20 to the following June 19.

The elapsed time regulations, however, allow plans to determine a year of service based on the passage of time and, further, permit plans to disregard any time period of less than a full 365 day year. Even an individual who worked nine years and 364 days would not be credited with ten years of service despite having worked far in excess of 1,000 hours during those last 364 days. (See, e.g., 26 C.F.R. Sec. 1.410(a)-7(d)(iv). (49a)) Thus, the elapsed time regulations authorize the denial of credit to employees, such as Swaida, who have complied with ERISA's 1,000 hour rule, thereby imposing a stricter standard than the statute permits and violating Congress' intent of establishing minimum standards.

As this Court held in Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158

n.3 (1981), "[a]bsent a clear indication of legislative intent to the contrary, the statutory language controls its construction." While the District Court found that the statutory language supported Swaida's position (24a), it also found that a literal interpretation of the statute was not in accord with the legislative intent. (25a) The District Court did not, however, demonstrate in what way the 1,000 hour rule deviated from Congressional intent in general, or the desire to establish minimum standards in specific. Because the District Court's opinion finds the elapsed time regulations permissible and in accord with Congressional intent, despite their imposition of a standard stricter than that adopted by Congress, the intent and meaning of ERISA will remain in a state

of confusion absent clarification. Because this is a question of continuing importance and will undoubtedly engender future litigation, it is desirable to have a definitive ruling at this time.

The District Court's opinion is based, essentially, on its determination that the elapsed time regulations are as equitable as the 1,000 hour rule (31a) and, therefore, because they are less burdensome (27a) and less costly (28a) to administer than the 1,000 rule, they were promulgated within the scope of authority of the Secretary of the Treasury (30a) pursuant to 26 U.S.C. Sec. 7805(a). (43a, n.33) This ruling departs from numerous prior decisions of this Court as well as the express language of ERISA.

The argument that the elapsed time regulations are "as equitable" as the 1,000 hour rule, which has never been

demonstrated, ignores the fact that ERISA confers rights on participants individually. In this sense, they are certainly not as equitable to Swaida who would be vested under the statute. Even assuming individual rights could be traded off by regulation, the regulations are unauthorized. As this Court held in U.S. v. Calamaro, "[n]either we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon." 354 U.S. 351, 357 (1957). See, also, Potomac Electric Power Co. v. Director, 449 U.S. 268, 283-284 (1980); TVA v. Hill, 437 U.S. 153, 194 (1978).

Further, in Rowan Companies, Inc. v. U.S., 452 U.S. 247 (1981), it was stated that 26 U.S.C. Sec. 7805(a) is not a rule making grant and that regulations promulgated thereunder are not entitled to the

deference that would be accorded regulations which were promulgated pursuant to a specific grant of authority. This is particularly applicable here because "the statute (ERISA) defines the rights...and fixes a standard by which the rights are to be measured." Manhattan General Equipment Co. v. C.I.R., 297 U.S. 129, 135 (1936). An alternate definition of the standard by regulation "is not a substitute for the definition set before us by the law makers.... (Citation omitted.) There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves." Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935).

This is especially true with respect to ERISA which has been described by this Court as a "comprehensive and reticulated statute" which was passed by Congress

"following almost a decade of studying the Nation's private pension plans." Nachman v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 441 (1980). It may not be presumed, absent specific language to the contrary, that standards different from those set forth in ERISA, especially stricter standards, may be imposed. Had Congress desired to incorporate the elapsed time regulations into ERISA, it most certainly would have done so. "The idea...is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least suggest it." Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618 (1944). Or, to paraphrase the Second Circuit in Duchow v. New York State Teamsters Conference Retirement and Pension Fund,

> had Congress intended ["year of service"] to be dependent on [continuous service throughout the year], it would hardly have selected such convoluted and imprecise [for respondents' purposes] language as [a "12-consecutive month period... during which the participant has completed 1,000 hours of service."]

691 F.2d 74, 80 (2d Cir. 1982).

Even if the elapsed time regulations are less burdensome and less costly to administer (which has not been demonstrated), this provides no support for the proposition that they may be substituted for a statutorily mandated standard. Congress was well aware of the costs of vesting and enacted ERISA in its current form despite those costs. See, Study of Cost of Mandatory Vesting Provisions for Private Pension Plans, Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 93d Cong. 1st Sess. 2/15/73

(G.P.O. 1973). In addition, Congress expressly provided for relief to be granted to plans in certain instances if administrative burden or cost were problematic. See, e.g., ERISA Sec. 110 (entitled "Alternative Methods of Compliance") which authorizes the Secretary of Labor to prescribe alternative methods of compliance with the Reporting and Disclosure provisions of ERISA if strict compliance would cause increased costs or administrative burden. 29 U.S.C. Sec. 1030. Congress obviously knew how to make exceptions for such circumstances yet provided none with respect to ERISA's vesting provisions. Expressio unius est exclusio alterius.

The United States Tax Court has had occasion to address this issue in Automated Packaging Systems, Inc. v. C.I.R., 70 T.C. 214 (1978). While the majority

opinion specifically declined to discuss the validity of the elapsed time regulations in those instances where, as here, it is more restrictive than the 1,000 hour rule, id. at 224, n. 11, the concurring opinion leaves little, if any, doubt as to how that issue would have been decided:

> It appears to me that petitioner's plan fails to meet the standards of the statute--in particular, paragraphs (1), (2) and 5(A) of section 411(a) of the Internal Revenue Code of 1954, as amended.* The plan fails because it is possible, under the plan's provisions set forth in the Court's opinion, for a participant to be denied a nonforfeitable right to his or her accrued benefit derived from

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*Numerous provisions of ERISA have identical counterparts in the Internal Revenue Code. I.R.C. Sec. 411(a)(5)(A), 26 U.S.C. Sec. 411(a)(5)(A) is the counterpart to ERISA Sec. 203(b)(2)(A), at issue herein.

> the employer contributions* even though the participant has completed 1,000 hours of service during each of that number of years which the plan is permitted to require under the appropriate subparagraph (2) of section 411(a) of the Code...**
>
> Since the statute forbids a plan to impose a greater obligation on a participant, I do not see how a regulation could validly permit a plan to impose a greater obligation on a participant.

Automated Packaging Systems, Inc. v. C.I.R., 70 T.C. 214, 224-225, (1978), Chabot, J., concurring.

Finally, petitioner would once again stress both the significance of the issue presented here and the fact that it was one of first impression not only in the Second Circuit, but in any Circuit. Petitioner would, therefore, respectfully

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*Vesting. See, ERISA Sec. 203(a), 29 U.S.C. Sec. 1053(a).

**Id.

but forcefully assert that it is unimaginable that the Second Circuit disposed of the questions presented to it in a per curiam decision without opinion. While petitioner appreciates the rise in caseload of the Circuit Courts of Appeal and the need to dispose of cases in summary fashion when a written opinion would not be of further precedential value, the law in the area being settled, such was certainly not the case here.

Petitioner is aware that a District Court opinion may be relied on when it disposes of the issues presented. However, with all due respect and deference to the District Court, its opinion is not one which will stand up to scrutiny, and it was the obligation of the Circuit Court of Appeals to confront the arguments which were raised before it rather than to ignore them. See, e.g., McCree,

Bureaucratic Justice: An Early Warning, 129 U. of Pa. Law Rev. 777, 790-791 (1981).

The Second Circuit's decision, if allowed to stand, will perpetuate uncertainty about the validity of the elapsed time regulations and the authority of governmental agencies to promulgate regulations in disaccord with Congressional enactments. It will further result in the continued misplaced reliance of pension plans on the elapsed time regulations to the detriment of participants and plans alike.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
June 28, 1984

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 568 - August Term, 1983

(Argued January 23, 1984
Decided February 22, 1984)

Docket No. 83-7792

PAUL P. SWAIDA, JR., individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

IBM RETIREMENT PLAN, RETIREMENT PLAN COMMITTEE OF THE IBM RETIREMENT PLAN, PLAN ADMINISTRATOR OF THE IBM RETIREMENT PLAN, BOARD OF DIRECTORS OF INTERNATIONAL BUSINESS MACHINES (IBM) CORPORATION, IBM VICE-PRESIDENT RESPONSIBLE FOR FINANCE, AND IBM VICE-PRESIDENT RESPONSIBLE FOR PERSONNEL,

Defendants-Appellees.

Before:

MESKILL, KEARSE and PRATT,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Weinfeld, J., Swaida v. IBM Retirement Plan, 570 F.Supp. 482 (S.D.N.Y. 1983), granting defendant's motion for summary judgment. The district court held that the elapsed time regulations promulgated by the Department of the Treasury were within its competence and in the exercise of delegated authority and that IBM, having structured its pension plan in conformity therewith, acted justifiably when it denied plaintiff's claim to a vested pension.

Affirmed on the opinion of Judge Weinfeld below.

DAVID S. PREMINGER, Braverman & Rosen, New York, New York, Karen W. Ferguson, Pension Rights Center, Washington, D.C., Stephen R. Bruce, Washington, D.C., for Plaintiff-Appellant.

JOHN M. VINE, Joanne B. Grossman, Covington & Burling, Washington, D.C., Richard J. Sweetnam, IBM Corporation, Armonk, New York, for Defendants-Appellees.

GLENN L. ARCHER, JR., Assistant Attorney General, Michael L. Paup, William S. Estabrook, Michael J. Roach, Tax Division, Department of Justice, Wshington, D.C., Rudolph W. Giuliani, United States Attorney for the Southern District of New York, New York, N.Y., for Amicus Curiae United States.

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Weinfeld,

J., Swaida v. IBM Retirement Plan, 570 F.Supp 482 (S.D.N.Y. 1983), granting defendant's motion for summary judgment. The district court held that the elapsed time regulations promulgated by the Department of the Treasury were within its competence and in the exercise of delegated authority and that IBM, having structured its pension plan in conformity therewith, acted justifiably when it denied plaintiff's claim to a vested pension.

We affirm the judgment of the district court for the reasons spelled out by Judge Weinfeld in his opinion below, Swaida v. IBM Retirement Plan, 570 F.Supp. 482 (S.D.N.Y. 1983).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 83-7792

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of February, one thousand nine hundred and eighty-four.

Present:

HON. THOMAS J. MESKILL
HON. AMALYA L. KEARSE
HON. GEORGE C. PRATT

Circuit Judges,

PAUL P. SWAIDA, JR., individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

IBM RETIREMENT PLAN, RETIREMENT PLAN COMMITTEE OF THE IBM RETIREMENT PLAN, PLAN ADMINISTRATOR OF THE IBM RETIREMENT PLAN, BOARD OF DIRECTORS OF INTERNATIONAL BUSINESS MACHINES (IBM) CORPORATION, IBM VICE-PRESIDENT RESPONSIBLE FOR FINANCE,

and IBM VICE-PRESIDENT RESPONSIBLE FOR PERSONNEL,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

by /s/ EDWARD J. GUARDARO
Edward J. Guardaro,

Deputy Clerk

Judgment Entered 4/24/84
S.D. of N.Y.
Raymond .F Burghardt, Clerk

Filed U.S. District Court, S.D. of N.Y.
April 24, 1984

Filed United States Court of Appeals
Second Circuit, February 22, 1984,
A. Daniel Fusaro, Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 11th day of April one thousand nine hundred and eighty-four.

PAUL P. SWAIDA, JR.,
individually and on behalf
of all others similarly situated,

Plaintiff-Appellant,

v. No. 83-7792

IBM REITIREMENT PLAN, RETIREMENT PLAN COMMITTEE OF THE IBM RETIREMENT PLAN, PLAN ADMINISTRATOR OF THE IBM RETIREMENT PLAN, BOARD OF DIRECTORS OF INTERNATIONAL BUSINESS MACHINES (IBM) CORPORATION, IBM VICE-PRESIDENT AND RESPONSIBLE FOR FINANCE, AND IBM VICE-PRESIDENT RESPONSIBLE FOR PERSONNEL,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having (sic) filed herein by

counsel for the plaintiff-appellant, Paul P. Swaida, Jr.,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

Filed United States Court of Appeals
Second Circuit, April 11, 1984
Elaine B. Goldsmith, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -X

PAUL P. SWAIDA, JR., individually and on behalf of all others similarly situated,

Plaintiff,

-against-

82 Civ. 3571

IBM RETIREMENT PLAN, RETIREMENT PLAN COMMITTEE OF THE IBM RETIREMENT PLAN, PLAN ADMINISTRATOR OF THE IBM RETIREMENT PLAN, BOARD OF DIRECTORS OF INTERNATIONAL BUSINESS MACHINES (IBM) CORPORATION, IBM VICE-PRESIDENT RESPONSIBLE FOR FINANCE, and IBM VICE-PRESIDENT RESPONSIBLE FOR PERSONNEL,

OPINION

Defendants.
- - - - - - - - - - - - - - - - -X

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For the United States
as Amicus Curiae

EDWARD WEINFELD, D. J.

This action was commenced by plaintiff,(1) Paul P. Swaida, Jr., a former employee of International Business

Machines Corporation ("IBM"), individually and on behalf of all others similarly situated, against IBM's directors, its retirement plan (the "Plan"), the Retirement Plan Committee and others who play a role in the administration and enforcement of the Plan (collectively "the defendants"). Plaintiff seeks a judgment (1) declaring that IBM's use of the "elapsed time method" for computing service for vesting credit under the Plan violates the vesting standards of the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act");[2] (2) enjoining the defendants from using the "elapsed time method" in the future; (3) declaring the plaintiff to be fully vested under the terms of the Plan; (4) directing the defendants to pay plaintiff benefits at such time as he becomes eligible to receive them; and

(5) directing defendants to grant credit to each member of the plaintiff class for any applicable year in which such class member satisfied the vesting standards of ERISA, but was denied credit for such year by the defendants pursuant to the "elapsed time method."

The defendants move, and the plaintiff crossmoves, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff also moves for an order certifying the action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The parties agree that there are no disputed issues of fact and that the matter is ripe for disposition under the Rule.

IBM has sponsored and maintained the Plan since 1945. At the end of 1981, 209,106 present and 25,634 former

employees were participants in the Plan.[3] It was amended on May 1, 1977, effective as of January 1, 1976 in order to comply with the provisions of ERISA.

Two methods have been in existence for years to measure an employee's length of service for determining whether he has earned a vested right to a pension.[4] Under one, referred to as the "elapsed time method," an employee receives credit for the time elapsed between two dates -- the date of his hire and the date his employment terminates, including credit for time off, holidays, vacations, sickness, leaves of absences and interruptions in his employment that do not exceed one year. The other, the "hours of service" method, gives credit for a year of service if the employee completes a specified number of hours of service in a year.[5] The IBM Plan uses

the "elapsed time method." Specifically, the Plan provides that a regular "employee who completes 10 or more years of continuous service...will have a vested right to a monthly income" at age 65 and in an amount determined by his years of service and compensation.(6) "Continuous service" is defined as "the time commencing with the date a Regular Employee first works an hour for which he or she is paid or entitled to payment under the Company's Personnel and Payroll practices then in effect and continues until the date the Regular Employee severs from service with the Company."(7) The Internal Revenue Service has issued a favorable determination letter with respect to various versions of the Amended Plan, including that which is applicable to the plaintiff.(8)

Swaida was employed by IBM on a full time basis as a professional employee. His last position was as a procedures specialist. His period of employment was from June 20, 1966 to April 9, 1976 -- nine years, nine months, and twenty-one days. He alleges that during the period from June 20, 1975 to April 9, 1976 he worked in excess of 1000 hours. Since Swaida was a professional employee and exempt from the Fair Labor Standards Act minimum and maximum hour provisions,(9) IBM was not required to, and did not, maintain records of his hours. Nevertheless, the defendants do not dispute Swaida's claim that he worked in excess of 1000 hours during the last nine months and twenty-one days of his employment with IBM.(10) Shortly after leaving IBM, Swaida requested that the Plan issue a certificate evidencing that

he had a vested right to a pension. IBM refused on the ground that he had not completed ten years of service as required by the Plan. Thereupon plaintiff instituted his action.

Plaintiff, in seeking to overcome his failure to meet the Plan's rule conditioning a vested right to a pension at age 65 upon completion of 10 or more years of elapsed time service, relies upon the vesting provisions of ERISA. Congress, in enacting these provisions, took note that "many employees with long years of employment are losing anticipated retirement benefits owing to lack of vesting provisions"(11) in many pension plans. Accordingly, Congress declared the policy of the Act to require pension plans "to vest the accrued benefits of employees with significant periods of service."(12) To implement

that policy, Congress established "minimum vesting standards." Section 203 of the Act specifies three alternative methods that a pension plan may use to satisfy ERISA's vesting requirement. One alternative, referred to as "10 year cliff vesting," is that used in the Plan here at issue. Subdivision (a)(2)(A) of section 203[13] provides:

> A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

The next subdivision, section 203(b)(2)(A)[14] provides:

> ...the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the Plan (and not prohibited under regulations prescribed by the Secretary of Labor) during which the participant has completed 1,000 hours of service.

Stripped to its essentials, plaintiff's position is that under the latter provision, if a participant completed 1000 hours of service in the "12-consecutive month period designated by the Plan," he would accrue one year of service for vesting purposes; that the vesting provision of the Act became applicable to the Plan in January 1976 and that the defendants were required to calculate plaintiff's service in accordance with the vesting provision of section 203(b)(2)(A), notwithstanding the elapsed time method as defined in the Plan, and had they done so he would be fully vested since, in addition to his nine years of previously credited service, he worked in excess of 1000 hours within the 12-consecutive month period following his ninth credited year of service. In sum, he argues that he is

entitled to credit for a year of service even though he was not employed for an entire 12-consecutive month period. Accordingly, he contends that any regulation, whether issued by the Department of Labor or the Department of the Treasury, that permits the elapsed time method to measure service for vesting purposes is unauthorized and inconsistent with ERISA.

The defendants' position in broad terms is that prior to ERISA the elapsed time method was the predominant method in use for measuring length of service for vesting purposes in pension plans except in multi-employer industries such as the construction and building, trucking, and coal industries; that after ERISA it continued to be used and was authorized by both the Departments of Labor and of the Treasury; that the only purpose of the 1000 hour language in

section 203(b)(2)(A) is to provide a minimum standard which, if met, entitles seasonal, intermittent and part time employees to a year's vesting credit if they complete their normally scheduled work year and that the history of the Act confirms that this was its only purpose. In sum, the defendants interpret the statutory provision as requiring both 12 months of employment and completion of 1000 hours of service during that year to obtain credit for a year of service for purposes of vesting.

At the heart of this controversy are Department of the Treasury regulations authorizing use of the elapsed time method of computing employees' vested rights. These regulations had been issued in temporary form by the Department of Labor[15] prior to a Presidential order reallocating responsibili-

ties for administering various aspects of ERISA between the Departments of Labor and of the Treasury.[16] On June 17, 1980, the Department of the Treasury issued final regulations authorizing pension plans to credit service for vesting purposes according to the elapsed time method.[17] The temporary regulations issued by the Department of Labor were withdrawn. The Treasury regulations, which are still in effect, state that an employee's vested right to a pension is not contingent upon "the actual completion of a specified number of hours of service during a 12-consecutive-month period," but rather is determined "with reference to the total period which elapses while the employee is employed (i.e., while the employment relationship exists) with the employer...."[18] For a plan already in

existence on January 1, 1974, such as IBM's,[19] the regulations were to apply retroactively to plan years beginning after December 31, 1975.[20] It is not disputed that IBM has been, since January 1, 1976, in compliance with the Treasury Department's "elapsed time" regulations.

Since the regulations issued by the Departments of Labor and of the Treasury were under attack and a ruling by this Court would necessarily affect hundreds of thousands of participants in many existing pension plans that use the elapsed time method, this Court suggested that the views of those agencies be solicited. In response the Department of Justice submitted a brief on behalf of the United States as amicus curiae. The government urges that the regulations authorizing an otherwise qualified plan to calculate years of service by the

"elapsed time method" as an alternative to counting a participant's actual hours of service are consistent with the intent of Congress and should be sustained.

Strictly read, the language in section 203(b)(2)(A) stating that a "year of service" means "a calendar year...or other 12-consecutive month period...during which the participant has completed 1,000 hours of service" gives surface support to plaintiff's position. But this provision cannot be read in isolation. What cannot be ignored is the overall purpose of the statute to protect the pension rights of all participants in the thousands upon thousands of plans, and that, as noted hereafter, to ensure the achievement of that purpose, Congress delegated to two governmental agencies, the Treasury and Labor Departments, substantial enforcement responsibilities

and power to issue regulations to clarify the terms "year of service" and "hour of service" as defined in section 203 of ERISA. We have long been admonished by Judge Learned Hand that "...it is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning," and that they may be "disregarded when it defeats the manifest purpose of the statute as a whole,"[21] -- an admonition that followed an earlier observation:[22]

> There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it.

These words are well taken with respect to the instant inquiry.

While the litigants, seeking to support their respective positions, cull

isolated references from various congressional reports and emphasize individual statements of legislators made during the long course of ERISA's history, nothing in the matter alluded to, standing along, gives direction to the issue at hand. The 1000 hour provision was not discussed extensively in either the Senate or the House of Representatives. It first appeared in the substitute bill produced by the committee of conferees representing the House and the Senate.(23) The conference committee report is ambiguous as to the purpose of the 1000 hour language.(24) Although some members expressed a belief that the sole purpose of the 1000 hour language was to protect part time workers, others expressed the view that the 1000 hour rule was to protect full time workers as well.(25)

Because the 1000 hour rule cannot be claimed to have a clearly defined purpose bearing on the issue here, it must be applied to further the broad purposes and intentions of Congress. Of the many purposes animating those who voted for ERISA, one was clear. Congress intended to set certain standards for pension plans, but not at the expense of workers as a whole.(26) Congress repeatedly made known its concern that a regulatory scheme that was administratively burdensome would not achieve the goal of protecting the pension rights of workers as a group.(27)

The legislative history does not suggest that every question of administration of the Act is presumptively to be determined in favor of an employee who has been denied a claim to future benefits.(28) Every grant of vested benefits

of necessity limits the pool of funds available for distribution to other employees. By limiting the costs of mandated recordkeeping under the Act, and by protecting employees temporarily severed from their jobs,[29] the elapsed time rules go far to ensure the maximum distribution of pension benefits, consistent with Congress' intentions in enacting ERISA.

Congress recognized that achieving its goal of establishing minimum standards without discouraging the creation and continued funding of pension plans would require a complex balancing of interests that in many instances would best be resolved in an administrative setting.[30] Substantial enforcement responsibilities were granted to governmental agencies. ERISA is replete with provisions by which Congress delegated

authority to the Secretaries of Labor and of the Treasury to define crucial terms under the Act.[31] In general, the Secretary of Labor was authorized to issue regulations defining accounting, technical, and trade terms, and otherwise carrying out the provisions of the Act.[32] In addition, the Secretary of the Treasury, under his existing residual rulemaking authority,[33] expressly reaffirmed under ERISA,[34] was empowered to clarify the term "year of service" as set forth[35] and defined [36] in the tax provisions of ERISA, which parallel the "year of service" provisions in section 203 of ERISA.[37] Congress explicitly mandated that the Secretary of the Treasury's regulations were to govern the operation of section 203's vesting standards.[38] These various related provisions leave no room to doubt that

Congress delegated to the Treasury Department authority to determine the method for computing an employee's service for purposes of his vested right to a pension and that the Secretary acted within the scope of his authority in authorizing the use of the elapsed time method. There is no basis for any contention that the regulations either exceeded delegated authority or that they were arbitrary or capricious.

The majority opinion in Automated Packaging Systems, Inc. v. Commissioner,(39) a decision of the United States Tax Court,(40) also lends support to this view of the Secretary's use of his delegated authority. Although both plaintiff and defendants cite the Tax Court's decision to support their positions, one aspect of the majority's ruling is beyond dispute: the Executive

officials responsible for administering ERISA's vesting standards have authority to permit the use of an alternative method of computing an employee's "years of service" if that method, in the judgment of those officers, is "'as equitable'" as the "hours of service" method, another of the alternative methods, referred to in section 203 of ERISA, as sufficient to satisfy the Act's minimum vesting requirements.(41) Such a determination was made with respect to the regulations here under attack and the Court has been provided with no persuasive reason to upset it.(42)

During the long period of study and debate that culminated in the passage of ERISA, the existence of the elapsed time method was well known.(43) It was the almost universal method, outside the multi-employer area, accepted by labor

and management alike to measure an employee's service for vesting purposes. It was the result of a process of give and take negotiations, with advantages and disadvantages to both sides. Aware of the use of the elapsed time method in thousands upon thousands of existing pension plans, Congress never discussed, much less intended, the prohibition of that method for measuring vested rights, as in effect plaintiff here urges. Had Congress desired to preclude the Secretaries of Labor and of the Treasury from issuing regulations permitting use of the elapsed time method, it readily could have, and this Court is convinced it would have, done so explicitly.(44)

The Court thus holds that the elapsed time regulations promulgated by the Department of the Treasury were within its competence and the product of

a proper exercise of delegated authority. Accordingly, the Court also holds that IBM, having structured its pension plan in conformity with those rules, acted justifiably when it denied plaintiff his claim to a vested pension. This disposition makes it unnecessary to address the plaintiff's motion for certification of a class action.

Judgment may be entered in favor of the defendants in accordance with the foregoing.

So ordered.

Dated: New York, N. Y.
August 24, 1983

EDWARD WEINFELD
United States District Judge

FOOTNOTES

(1) Plaintiff throughout his moving papers refers to the "plaintiffs," in apparent anticipation of a favorable ruling by this Court on a motion to certify a class. The Court's disposition on the merits has made the class action motion moot.

(2) ERISA Sec. 203, 29 U.S.C. Sec. 1053 (1976); see also ERISA Sec. 1012(a), 26 U.S.C. Sec. 411 (1976) (vesting standards that must be met before Secretary of the Treasury may grant statutory tax benefits to a pension plan).

(3) Affidavit of Donald H. Edman, IBM Director of Employee Benefits, [Edman Aff.] at para. 2. The term "participant means an employee or former employee of an employer...who is or may become eligible to receive a benefit of any type from any employee benefit plan...." ERISA Sec. 3(7), 29 U.S.C. Sec. 1002(7) (1976).

(4) Under the terms of ERISA, a "vested right" is one that is "nonforfeitable." See, e.g., ERISA Sec. 1012(a), 26 U.S.C. Sec. 411(a)(2) (1976). "Nonforfeitable," in turn, is defined by ERISA to mean "a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is

unconditional, and which is legally enforceable against the plan." ERISA Sec. 3(19), 29 U.S.C. Sec. 1002(19) (1976).

(5) Affidavit of Donald S. Grubbs, Jr. former consultant to the Senate Committee on Labor and Human Resources Subcommittee on Labor, [Grubbs Aff.] at para. 4.

(6) IBM Retirement Plan, as Amended as of May 1, 1974, Art. 13(A), Exhibit 1 to Edman Aff. at 11; IBM Retirement Plan, as Amended May 1, 1977, Art. 18(A) [Amended Plan], Exhibit 2 to Edman Aff. at 23. Plaintiff and defendants agree that plaintiff's rights are to be determined according to the substantive vesting rules described in the 1977 plan. See Plaintiffs' Memorandum of Law at 10; Defendants' Memorandum in Support of Motion for Summary Judgment [Defendants' Memorandum] at 6.

(7) Amended Plan, Art. 2(o), Exhibit 2 to Edman Aff. at 2.

(8) Edman Aff. at para 7. Pension Plans that meet the requirements of the Internal Revenue Code, including, inter alia, ERISA's vesting standards, ERISA Sec. 1012(a), 26 U.S.C. Sec. 411 (1976), are entitled to favorable tax treatment. 26 U.S.C. Sec. 401 (1976). Upon request, the Internal Revenue Service will issue a determination letter indicating that a new or amended pension plan qualifies for such treatment. 26

C.F.R. Secs. 601.201(a)(3), (o) (1982).

(9) 29 U.S.C. Sec. 213(a)(1) (1976).

(10) Defendants' Memorandum at 3, 10

(11) ERISA Sec. 2(a), 29 U.S.C. Sec. 1001(a) (1976).

(12) Id. Sec. 2(c), 29 U.S.C. Sec. 1001(c) (1976).

(13) 29 U.S.C. Sec. 1053(a)(2)(A) (1976).

(14) Id. Sec. 1053(b)(2)(A) (1976).

(15) 41 Fed. Reg. 56,484 (1976).

(16) Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (1978).

(17) 45 Fed. Reg. 40,980 (1980).

(18) 26 C.F.R. Sec. 1.410(a)-7(a)(ii) (1982). Although the "elapsed time method" is described in those parts of the regulations relating to minimum participation standards, and not those relating to minimum vesting standards, the regulations governing vesting have incorporated the "elapsed time method" rules by reference. See, e.g., 26 C.F.R. Secs. 1.411(a)-5(b)(2), 1.411(a)-6(c)(2) (1982).

(19) See 26 C.F.R. Secs. 1.410(a)-2(c), 1.411(a)-2(c) (1982) (defining when a plan is "in existence"); Edman Aff. at paras. 2, 3.

(20) See 26 C.F.R. Secs. 1.410(a)-2(b), 1.411(a)-2(b) (1982) (defining effective dates). The parties have raised no question concerning the retroactive application of the "elapsed time method" regulations. Nor do plaintiff or defendants attach significance to the fact that the tenth year for which plaintiff seeks credit began prior to the effective date of the Treasury regulations. See, e.g., Complaint at paras. 23-30; Defendants' Memorandum at 22-30.

(21) Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). See also Giuseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J., concurring); Federal Deposit Ins. Corp. v. Tremaine, 133 F.2d 287 (2d Cir. 1943).

(22) Federal Deposit Ins. Corp. v. Tremaine, 133 F.2d 827, 830 (2d Cir. 1943).

(23) Defendants claim that the 1000 hour provision "originated" in the House of Representatives. Defendants refer to the original provision in the bill passed by the House of Representatives conferring authority upon the Secretary of Labor to issue regulations defining the term "year of service," and argue that legislative intent is revealed by comments in committee reports that the Secretary may wish to require "in some industries" that a participant be asked to work only 1000 hours "to

have completed a 'year of service[.]'." Defendants' Memorandum at 24 (quoting H.R. Rep. No. 779, 93d Cong., 2d Sess. 57 (1974)). Defendants concede that, before the House of Representatives received its committee's report making these suggestions, the Senate Committee on Finance had recommended that the Senate pass a provision explicitly stating that an employee who had completed 80 hours of service in each of at least five months during the plan year was to be considered as having completed a "year of service" under the Act. S. Rep. No. 93-383, 93d Cong., 1st Sess. 48 (1973), reprinted in 1974 U.S. Code Cong. & Ad. News 4933. Such a provision was adopted by the Senate. Defendants' Memorandum at 25-26.

Defendants point to committee members' concern that part time and seasonal workers be protected under ERISA and draw the conclusion that the protections of either the "1000 hour" or 5-month, 80 hour rules were to be conditioned upon the employee's maintenance of an employment relationship (i.e., by continuing to work or, if one is a seasonal worker, by operation of the presumption that if work were available one would do it) through the end of the plan year. See Defendants' Memorandum at 27-28.

The question, however, is not whether the original versions of ERISA Sec. 203(b)(2)(A) were intended to protect part time and seasonal workers, but how those

protections applied to a "full time" worker if the worker quit before the end of the plan year. The reports to which defendants refer are wholly silent on this question.

(24) The Joint Explanatory Statement reprinted in the House and Senate conference reports provides, in relevant part:

> In general, under the conference substitute, the rules with respect to "year of service", seasonal and part-time employees, etc., are the same for purposes of the vesting schedule as they are for purposes of participation (i.e., generally 1,000 hours of service except for seasonal industries, where the customary work year is less than 1,000 hours).

H.R. Rep. 93-1280, 93d Cong., 2d Sess. 269, reprinted in 1974 U.S. Code Cong. & Ad. News 5050-51.

The bearing of this language on the problem before the Court is slight at best. Although the explanation of the operation of the "1000 hour" provision under the "participation" provisions of ERISA suggests that employees who do not remain available for work through the end of the plan year are not to be credited, see id. at 262-63, reprinted in 1974 U.S. Code Cong. & Ad. News 5045, differences in the

manner in which the participation rules and the vesting rules operate make it difficult to draw analogies between Congress' intentions regarding the participation provisions and its purposes in enacting the vesting standards. Compare ERISA Sec. 202, 29 U.S.C. Sec. 1052 (1976), with ERISA Sec. 203, 29 U.S.C. Sec. 1053 (1976).

(25) Compare 120 Cong. Rec. 29,213 (1974) (remarks of Rep. Harrington) with id. at 29,929 (remarks of Sen. Williams) and id. at 29,936 (remarks of Sen. Javits). The only evidence even remotely bearing on Congress' specific intent with regard to the question here is that during consideration of the conference version of the bill two senators introduced into the record a magazine article stating that, under the most recent version of the bill, if a pension plan employed "10 year cliff-vesting" and a worker "quits after 9½ years[,] he will lose all of his accumulated pension rights." Id. at 29,955 (article submitted by Sen. Nelson); id. at 29,958 (article submitted by Sen. Ribicoff). Without more, this aspect of the legislative record would be a slender reed upon which to rest a binding interpretation of ERISA.

(26) Congress' specific concern was that the minimum standards established by ERISA would discourage the growth of pension plans. See H.R. Rep. No. 93-533, 93d Cong., 1st Sess., re-

printed in 1974 U.S. Code Cong. & Ad. News 4639; S. Rep. 93-127, 93d Cong., 1st Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4838, 4844; see also 120 Cong. Rec. 29,198 (1974) (remarks of Rep. Ullman: overly bur-densome [sic] requirements would be "self-defeating"), reprinted in 1974 U.S. Code Cong. & Ad. News 5167.

(27) See, e.g., 120 Cong. Rec. at 29,210-11 (1974) (remarks of Rep. Rostenkowski); id. at 29,942 (remarks of Sen. Javits). See also ERISA Sec. 3004(a), 29 U.S.C. Sec. 1204(a) (1976) (mandating that agencies administering ERISA issue rules "designed to reduce duplication of effort...and the burden of compliance" (emphasis added)).

(28) This Court held only recently that a pension plan trustee's refusal to accelerate distribution of vested benefits to individuals leaving to work for a competing firm was 'consistent with the Trustees' statutory duty to administer the Plan 'solely in the interests of the participants.'" Romacho v. Stanley, No. 82-211, slip op. at 8 (S.D.N.Y. July 21, 1983). The Court recognized, as did the Congress in delegating authority to administrative agencies, that "[t]he amount of contributions to the Plan... depends on the continuing financial success of the sponsoring companies." Id.

(29) Grubbs Aff. at para 7(c); Letter of George J. Pantos, ERISA Regulations Industry Committee, to United States Department of Labor, Nov. 7, 1975, Defendants' Memorandum, Exhibit 2, at 2-3 ($2 to $10 savings in administrative savings per employee per year through use of "elapsed time" over "hours of service" method); see 26 C.F.R. Sec. 1.140(a)-7(c)(2)(iii)(A) (1982) (requiring plans to credit a year of service to an employee's account if, after quitting, the employee performs an hour of service within a year).

(30) See, e.g., 120 Cong. Rec. 29,941 (1974) (remarks of Sen. Javits: need to "incorporate the historic role of the Internal Revenue Service with respect to qualified plans as well as the broader roll visualized for the Labor Department in terms of safeguarding the interests of participants and beneficiaries and applying its expertise in connection with collectively bargained plans....").

(31) See, e.g., ERISA Secs. 203(b)(2)(B), 29 U.S.C. Sec. 1053(b)(2)(B) (1976) (authority to clarify term "hour of service"). Administrative interpretation not simply of the scope of authority, but also the propriety of a particular exercise of rulemaking power, is "always entitled to deference." Cartledge v. Miller, 457 F. Supp. 1146, 1154 n.39 (S.D.N.Y. 1978). See National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476-77 (1979).

(32) ERISA Sec. 505, 29 U.S.C. Sec. 1135 (1976) see Automated Packaging Systems, Inc. v. Commissioner, 70 T.C. 214, 219 (1978).

Although plaintiff challenges the authority of the Secretary of Labor to issue the temporary elapsed time regulations, Plaintiffs' Memorandum of Law at 30-37, the Court finds that, in light of the Secretary of the Treasury's authority to issue the final regulations clarifying the term "year of service," see infra note 33, it is not necessary to consider either this argument insofar as it suggests Congress did not grant the Secretary of Labor the power to issue any regulations that would bear on the statutory issue in this case or the argument that the President's reorganization plan, supra note 16, was consistent with the limitations on the President's reorganization authority, see 5 U.S.C. Sec. 905(a)(4) (1976).

(33) 26 U.S.C. Sec. 7805(a) (1976).

(34) ERISA Sec. 3002(c), 29 U.S.C. Sec. 1202(c) (1976).

(35) ERISA Sec. 1012(a), 26 U.S.C. Sec. 411(a)(2)(A) (1976).

(36) Id., 26 U.S.C. Sec. 411(a)(5)(A) (1976).

(37) 29 U.S.C. Secs. 1053(a)(2)(A), (b)(2)(A) (1976).

(38) ERISA Sec. 3002(c), 29 U.S.C. Sec. 1202(c) (1976).

(39) 70 T.C. 214 (1978).

(40) The Tax Court has been granted special jurisdiction to hear declaratory actions concerning a pension plan's compliance with ERISA, ERISA Sec. 1041(a), 26 U.S.C. Sec. 7476 (1976), and may be presumed expert in these matters.

(41) 214 T.C. at 224 (quoting S. Rep. No. 93-127, 93d Cong., 1st Sess. 39, reprinted in 1974 U.S. Code Cong. & Ad. News 4875). In its decision, the Tax Court upheld the imposition of "service spanning requirements," which are an integral part of the elapsed time method. The service spanning requirements, like the provisions of the elapsed time regulations at issue here, appear to depart in some respects from the literal language of ERISA. Compare 41 Fed. Reg. 56,485 (1976) (to have been codified at 29 C.F.R. Sec. 2530.200b-9(a)(3)(vi), repealed and repromulgated, 45 Fed. Reg. 40,980 (1980)) with ERISA Sec. 203(b)(3)(A), 29 U.S.C. Sec. 1053(b)(3)(A) (1976).

(42) See National Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476-77 (1979).

(43) Grubbs aff. at paras. 5, 10.

(44) Cf. Chiarella v. United States, 445 U.S. 222, 233 (1980) (refusing to abandon common law conception of duty in the absence of "some explicit evidence of legislative intent" to the contrary); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) (holding statutory question governed by view of damages prevailing on date of a statute's enactment).

RELEVANT STATUTES AND REGULATIONS

ERISA Sec. 203(b)(2)(A), 29 U.S.C. Sec. 1053(b)

> (2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

26 C.F.R. Sec. 1.410(a)-7

> (a) In general - (1) Introduction to elapsed time method of crediting service. (i) 29 CFR Sec. 2530.200b-2 sets forth the general method of crediting service for an employee. The general method is based upon the actual counting of hours of service during the applicable 12-consecutive-month computation period. The equivalencies set forth in 29 CFR Sec. 2530.200b-3 are alsc methods for crediting hours of service during computation periods. Under the general method and the equivalencies, an employee receives a year's credit (in units of years of service or years of participation) for a computation period during which the employee is credited with a specified number of hours of service. In general, an employee's statutory entitlement with respect to eligibility to participate,

vesting and benefit accrual is determined by totalling the number of years' credit to which an employee is entitled.

(ii) Under the alternative method set forth in this section, by contract, an employee's statutory entitlement with respect to eligibility to participate, vesting and benefit accrual is not based upon the actual completion of a specified number of hours of service during a 12-consecutive-month period. Instead, such entitlement is determined generally with reference to the total period of time which elapses while the employee is employed (i.e., while the employment relationship exists) with the employer or employers maintaining the plan. The alternative method set forth in this section is designed to enable a plan to lessen the administrative burdens associated with the maintenance of records of an employee's hours of service by permitting each employee to be credited with his or her total period of service with the employer or employers maintaining the plan, irrespective of the actual hours of service completed in any 12-consecutive-month period.

. . .

(d) Vesting - (1) General rule. (i) For purposes of section 411(a)(2), relating to vesting in accrued benefits derived from employer contributions, a plan which determines service to be taken in account on the basis of

elapsed time shall provide that an employee is credited with a number of years of service equal to at least the number of whole years of the employee's period of service, whether or not such periods of service were completed consecutively.

(ii) In order to determine the number of whole years of an employee's period of service, a plan shall provide that nonsuccessive periods of service must be aggregated and that less than whole year periods of service (whether or not consecutive) must be aggregated on the basis that 12 months of service (30 days are deemed to be a month in the case of the aggregation of fractional months) or 365 days of service equal a whole year of service.

(iii) Service spanning rules. In determining a participant's period of service for vesting purposes, a plan shall take into account the following periods of severance -

(A) If an employee severs from service by reason of a quit, discharge or retirement and the employee then performs an hour of service within the meaning of 29 CFR Sec. 2530.200b-2(a)(1) within 12 months of the severance from service date, the plan is required to take intc account the period of severance; and

(B) Notwithstanding paragraph (d)(1)(iii)(A) of this section, if an employee severs from service by reason

of a quit, discharge or retirement during an absence from service of 12 months or less for any reason other than a quit, discharge, retirement or death, and then performs an hour of service within the meaning of 29 CFR Sec. 2530.200b-2(a)(1) within 12 months of the date on which the employee was first absent from service, the plan is required to take into account the period of severance.

(iv) For purposes of determining an employee's nonforfeitable percentage of accrued benefits derived from employer contributions, a plan, after calculating an employee's period of service in the manner prescribed in this paragraph, may disregard any remaining less than whole year, 12-month or 365-day period of service. Thus, for example, if a plan provides for the statutory five to fifteen year graded vesting, an employee with a period (or periods) of service which yield 5 whole year periods of service and an additional 321-day period of service is twenty-five percent vested in his or her employer-derived accrued benefits (based solely on the 5 whole year periods of service).